

PEABODY COAL CO.
V.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-695 Decided February 17 1988

Appeal from an Administrative Law Judge's decision finding that Peabody Coal Company was liable for a total of \$3,325 civil assessments for the notices of violation 84-06-12-01 and 84-06-12-02. Docket No. Ch 4-22-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:
Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-
day Notice to State--Surface Mining Control and Reclamation Act of 1977: State
Program: 10-day Notice to State--Words and Phrases

"Good cause for such failure." As used in 30 CFR 843.12(b), the term "good cause for such failure" of a state regulatory authority to take appropriate action after the receipt of a 10-day notice does not include the legal inability of the agency to act, but rather is limited to a showing either that no violation existed or that the operation was not subject to the provisions of the Surface Mining Control and Reclamation Act of 1977.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:
Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-
day Notice to State--Surface Mining Control and Reclamation Act of 1977: State
Program: 10-day Notice to State

As used in 30 CFR 843.12(b), the terms "state program" must be interpreted as including within its ambit so much of the initial Federal performance standards as continued to apply to mining operations within the State after the approval of the State permanent program.

3. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally—Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State—Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State

Where an operator has actual knowledge that religious services are being conducted in a building, the operator will not be heard to argue that the building was not a "church" within the meaning of 30 CFR 715.19(e)(2)(ii)(B)(i).

APPEARANCES: David R. Joest, Esq., Evansville, Indiana, for Peabody Coal Company; Glenda H. Owens, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of the Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On August 20, 1984, Peabody Coal Company (Peabody) petitioned for discretionary review of a decision of Administrative Law Judge Frederick A. Miller, dated June 4, 1985, affirming the validity of notices of violation (NOV) Nos. 84-06-12-01 and 84-06-12-02, and the assessment of a civil penalty in the amount of \$3,325. By order of July 9, 1985, this Board granted the petition and provided for briefing of the issues. The matter is now ripe for a decision on its merits.

On March 28 and April 11, 1984, the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued two 10-day notices (TDN's), Nos. 84-06-12-03 and 84-06-11-04, respectively, to the State of Indiana pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1982). TDN No. 84-06-12-03 provided a notice to the State that Peabody was in violation of 30 CFR 715.19(e)(2)(ii) for exceeding the maximum allowable ground vibrations at the Embury Church, located one-half mile off the permit area. The second TDN No. 84-06-12-04 notified the State that Peabody had exceeded the maximum allowable decibel linear-peak at Embury Church in violation of 30 CFR 715.19(e)(1)(vi).

In a letter dated March 29, 1984, Indiana responded to TDN No. 84-06-12-03 by stating:

We realize that the ground motion noted in our Feb. 15, 1984, inspection report is excessive according to the standards provided by our permanent program regulations. However, the above permit is not yet subject to those standards. At present our enforcement of performance standards relative to blasting activities in extended interim permits is limited to what is provided in I.C. 13-4.1. Unfortunately, the statute sets no limit on ground motion. We do not have the authority

to take enforcement action in violations of 30 CFR. Therefore, no Notice of Violation will be issued in response to the above Ten-Day Notice.

The State reiterated this position in an April 11, 1984, letter responding to TDN No. 84-06-12-04.

On April 11 and 12, 1984, OSMRE issued NOV Nos. 84-06-12-01 and 84-06-12-04 for the detonation of explosives at the Latta-Gilmour field in violation of 30 CFR Subpart 715.19. NOV No. 84-06-12-01 cited Peabody with violating the airblast standard of 30 CFR 715.19(e)(1)(vi). The ground vibration and air-blast levels were measured at the Embury Church. In the NOV's, OSMRE required the permittee to demonstrate its ability to conduct blasting operations in accordance with section 715.19(e) by seismographic monitoring of the blasts for a 30-day period at the Embury Church.

In order to understand the State's response to the TDN, it is appropriate at this juncture to outline the status of Federal/State enforcement under SMCRA in Indiana at the time of the alleged violations. At that time, Indiana's approved permanent surface mining program had replaced the Federal interim enforcement program established pursuant to section 502 of SMCRA, 30 U.S.C. § 1252 (1982), and 30 CFR Subpart 710. ^{1/} Thus, the Indiana Department of Natural Resources (DNR) had assumed primary enforcement authority for all surface coal mining and reclamation operations on non-Federal and non-Indian lands in the State. 30 CFR 914.10.

At the time of the violations, Peabody possessed an interim program permit and had applied for, but not yet received, a State permanent program permit. ^{2/} Under the Act, surface mining operations were required to comply with the Federal interim regulatory program until a permanent State or Federal program was in place. 30 U.S.C. § 1252(e) (1982); 30 CFR 710.11(a)(3). Once a permanent state program was effective, the operator was required to comply with that program. 30 U.S.C. § 1252(e) (1982); 30 CFR 710.11(a)(3). However, until an operator received a permit to operate under a permanent state or Federal regulatory program, it was required to comply with the terms of the interim program permit. 30 CFR 710.11(a)(3)(iii). Therefore, although the Indiana State permanent program was in place in March and April 1984, Peabody was required to comply with the terms of its interim program permit and the interim regulatory program.

^{1/} The Indiana State surface mining program was conditionally approved by OSMRE effective July 29, 1982. 30 CFR 914.10. Effective Aug. 19, 1983, the Indiana program as amended as set forth in 30 CFR 914.15, was fully approved.

^{2/} During the Federal interim program, states were authorized to issue interim program surface mining permits. 30 U.S.C. § 1252(a) and (b) (1982); 30 CFR 710.4(b). At the time of the violations Peabody was operating under an interim permit, No. 81-49, issued by the Indiana DNR.

The Indiana DNR had initially received authority from the Indiana State legislature to enforce the interim regulatory program. However, this authority expired on June 30, 1983. ^{3/} Thus, at the time of Peabody's violations, Indiana DNR's authority to enforce the interim program regulations had expired under Indiana law. That was the basis for its refusal to enforce the Federal interim regulation, 30 CFR Subpart 715, as required by the two TDN's.

Peabody contended in its appeal before Judge Miller ^{4/} that OSMRE did not have jurisdiction under section 521(a)(1) of SMCRA, 30 U.S.C. §1271(a)(1) (1982), and 30 CFR 843.12(a)(1) to issue the NOV's. Section 521(a)(1) of the Act provides, in part:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, this Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriation action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. [Emphasis supplied.]

30 U.S.C. § 1271(a)(1) (1982).

The applicable regulation provides:

When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program or any condition of a permit or exploration approval required by the Act which does not create a imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation

^{3/} This date was chosen under the assumption that Indiana DNR would have processed all permanent program permit applications by that date. This proved not to be the case.

^{4/} The parties waived their right to an administrative hearing, filing, instead, a stipulation of facts. Judge Miller's decision was based in this written record.

to the State and to the permittee so that appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be correct, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before the issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(b) of this chapter. [Emphasis supplied.]

30 CFR 843.12(a)(2). The underscored language in the statute and regulation is at the center of the controversy in this case.

Peabody argued below that the regulation under which OSMRE proceeded, 30 CFR 843.12(a)(2), did not give OSMRE authority to enforce anything other than the Act, the State program, and any condition of its permit, and that Peabody had violated none of these. Drawing a distinction between the Act and the regulations promulgated pursuant thereto, Peabody asserted that OSMRE did not have the authority to issue an NOV for a violation of the Federal interim regulations once it had approved a permanent State program.

Peabody also argued that Indiana's response to the 10-day notice, its stated "legal inability" to take enforcement action, constituted "good cause for such failure" to take enforcement action under the applicable statute and regulation and precluded action by OSMRE.

In his decision, Judge Miller rejected both arguments, noting that Peabody was "focusing on the letter of the law and ignoring its spirit" (Decision at 3). He concluded that OSMRE properly exercised its jurisdiction in its Federal oversight role. Id.

Peabody further argued that the blasting restrictions were not applicable to the Embury Church because the group of persons using the church was not affiliated with the building owner and the use of the church was unauthorized. Thus, Peabody contended that the Embury Church was neither a "structure" nor a "church" within the meaning of 30 CFR 715.19(e)(1)(vi) and 715.19(e)(2)(ii)(B)(i). Judge Miller rejected this argument, noting that Peabody had actual knowledge of the structure's use during the blasting period. Contending that the Act was designed to protect people and property he concluded that these regulations were properly applied to protect the church during Peabody's blasting operations. Therefore, he determined that the NOV's were properly issued.

In its brief in support of its petition for discretionary review, Peabody asserts Judge Miller erred in holding: (1) that the legal inability of a state regulatory agency to enforce a Federal regulation allegedly violated is not "good cause" for the state's failure to take enforcement action under 30 CFR 843.12(a)(3); (2) that 30 CFR 843.12(a)(3) authorizes OSMRE to

issue NOV's for violations of the Federal initial regulatory program, 30 CFR Part 700; and (3) that a church, even if abandoned and used by "unauthorized persons for religious services," is a "church" under 30 CFR 715.19(e)(2)(ii)(B) and a "structure" under 30 CFR 715.19(e)(1)(vi). We will discuss these arguments seriatim

Peabody's basic theory works as follows. Inasmuch as it had not received a permanent program permit, it was not covered by the approved State permanent program insofar as performance standards were concerned. Rather, it was covered by the interim performance standards set forth in

30 CFR Part 715 until such time as its permit issued. See e.g., 49 FR 17071 (Apr. 21, 1983). While Indiana law had originally invested DNR with authority to enforce the interim performance regulations, that authority lapsed on June 30, 1983, prior to the actions under review here. When OSMRE issued the two TDN's to DNR, DNR properly responded that it lacked authority to enforce the interim regulations. The attempt by OSMRE to enforce the interim regulations under 30 CFR 843.12(a)(2) should be rejected because the State had shown "good cause" for its failure to act and also because nothing in 30 CFR 843.12d(a)(2) grants OSMRE the authority to enforce the interim performance regulations, even though they were only regulations that applied to appellant's operation. In short, Peabody argues that even if it had violated the interim performance regulations, there was no authority that could call it to account. We do not agree.

[1] There are two distinct errors in Peabody's analysis. First of all, the fact that DNR lacked authority to enforce the interim performance standards is not "good cause" for its failure to take action to abate the violations within the meaning of 30 CFR 843.12(a)(2). The phrase relating to "good cause for such failure" appears both in section 521(a)(1) of SMCRA and in 30 CFR 843.12(a)(2). A review of both the legislative and regulatory history fails to disclose a specific analysis of what was intended by this term. See generally H.R. Rep. No. 1072, 93d Cong., 2d Sess. 26 (1974); H.R. Rep. No. 1522, 93d Cong., 2d Sess 78 (1974); 43 FR 41662, 41794-96 (Sept. 18, 1987); 44 FR 14902, 15302-03 (Mar. 13, 1979). However, nothing in a review of these documents gives the faintest support to appellant's argument that the inability of a state regulatory authority to act, for whatever reason, could ever constitute "good cause" for not taking steps to abate a violation.

Under Peabody's argument, a state regulatory authority could respond to a TDN by declaring that it had insufficient personnel or inadequate funding to enforce the Act, and OSMRE would be powerless to abate an on-going violation unless it first took the drastic and time-consuming step of substituting Federal enforcement of the state program under 30 CFR Part 733. While either insufficient personnel or inadequate funding might well justify such severe measures by OSMRE, nothing in the Act suggests that during the period in which mechanisms to substitute Federal enforcement are being pursued, OSMRE must stand idly by and permit operators to violate the law with impunity, or the Secretary must, to remedy a single infraction, resort to such a draconian response. See 44 FR 15302 (Mar. 13, 1979)). In the instant case, while the Secretary might well have concluded that the inability of DNR to enforce the

interim performance standards on extended interim permits justified direct Federal enforcement under 30 CFR Part 733, he was not precluded from taking more limited steps to rectify the situation, particularly when the fact of violation was beyond dispute.
5/

We hold that the term "good cause" in this context is limited to showings by the State regulatory authority that it has found no violation has occurred. Thus, the regulatory authority could show that the facts do not demonstrate the existence of a violation of the applicable performance standard or that the operation was not subject to the Act. Inability of a state regulatory authority to prevent violations of the Act, however, is simply not "good cause."

[2] Peabody's second argument is more technical in nature. Peabody contends that even if the State regulatory authority did not show good cause for its failure to act, OSMRE could only cite violations of the Act, the approved State program, or its permit. Since the approved State permanent program was not applicable to appellant insofar as the performance standards were concerned, Peabody argues that OSMRE could only cite violations of the Act or of its permit, neither of which contain the specific standards Peabody allegedly violated. In short, Peabody seeks to invoke the doctrine of "expressio unius est exclusio alterius," arguing that omission of the phrase "this chapter" on 30 CFR 843.12(b), a reference to which does appear in both 30 CFR 843.11(a)(1) and 843.12(a), shows that the Secretary affirmatively chose not to give OSMRE authority to cite violations of the Federal regulations when an approved state program was in place, unless such violations created an imminent danger to health or the environment.

The question then resolves itself into an injury as to whether the failure of the Secretary to include the phrase "this chapter" in 30 CFR 843.12(a)(2) is properly deemed as an abjuration of authority to issue NOV's where the actions undertaken by an operator were violations of applicable Federal performance standards. A review of the regulations relating to Federal oversight enforcement fails to convince us that such is the case.

In analyzing these regulations, it is absolutely essential that the underlying factual basis in which they operate be kept in the forefront. Thus, both 30 CFR 843.11 and 30 CFR 843.12 presuppose either an approved state permanent program, or a permanent Federal program. Furthermore, an approved state program must, at a minimum, contain performance standards no less effective than the Federal regulations. See 30 CFR 730.5; 30 CFR 732.15.

Two separate provisions were drafted to deal with the cessation order (CO's) and NOV's. Under 30 CFR 843.11, the Secretary is authorized to issue a CO after a Federal inspection for any condition, practice, or violations "of

5/ Admittedly, Peabody does contest the NOV on the additional ground that Embury Church was not a "church" within the meaning of the written performance standards. We reject this argument, infra.

the Act, this chapter, any applicable program or any condition of an exploration approval or permit" which is found to create an imminent harm danger to the health or safety of the public or is causing or could reasonably be expected to cause significant, imminent environmental harm. See 30 CFR 843.11(a)(1). Additionally, under this regulation, the Secretary is authorized to issue CO's for failure to abate NOV's issued under 30 CFR 843.12(a). See 30 CFR 843.11(b)(1). In reviewing this regulation, it is important to note that there is no distinction between Federal oversight of state permanent programs and direct Federal regulation under the permanent Federal program or the Federal lands program. Rather, they are all covered by the same regulation.

A distinction is made in the next revision, however. See 30 CFR 843.12. Thus, 30 CFR 843.12(a) provides for issuance of NOV's for violations which do not create an imminent danger or harm under a Federal program, the Federal lands program, or Federal enforcement of a state program pursuant to 30 CFR Part 733. The next section, 30 CFR 843.12(b), covers issuance of NOV's when there is an approved state program in effect. Under 30 CFR 843.12(b), the Secretary must first issue a TDN to the state regulatory authority. If, after 10 days, the state regulatory authority fails to take appropriate action to cause the violation to be corrected or show good cause for such failure (see discussion, supra), an authorized representative shall reinspect and, if the violation continues to exist, issue an NOV or CO as appropriate.

Appellant makes much of the fact that the regulations differentiate between these two situations in that, under 30 CFR 843.12(a), the Secretary may issue an NOV for any violation "of the Act, this chapter, the applicable program or any condition of any permit," whereas under 30 CFR 843.12(b), an NOV may be issued for a violation "of the Act, the State program, or any condition of a permit." It is the absence of the phrase "this chapter" in 30 CFR 843.12(b) upon which the appellant relies for its argument that the Secretary lacked authority to issue the subject NOV's.

The reason that this differentiation is obvious and has nothing to do with appellant's argument. The simple fact of the matter is that the only performance standards applicable to the Federal program and for the Federal lands program are those set out in 30 CFR Chapter VII. For approved state programs, on the other hand, the applicable performance standards are set forth in the approved state program and are necessarily no less effective than the Federal regulations. See section 502(a) of SMCRA, 30 U.S.C.

§ 1253(a) (1982); 30 CFR 730.5. In point of fact, the Indiana permanent program regulations include specific peak-particle velocity and airblast standards (see Rule 5. Performance Standards, sec. 36 and sec. 101, Use of Explosives: Surface Blasting Requirements, (SNVTL Rep. - Mining at 1571.0552-0553, 0567-0569)), that mirror those set out in 30 CFR 715.19. These Indiana regulations did not apply only because appellant had not yet received its permanent program permit. However, in the absence of such a permit, the Federal interim performance standards set forth at 30 CFR 715.19 did apply. See 30 CFR 710.11(a)(3)(iii).

Peabody's case must ultimately stand or fall on its contention that the Secretary, for reasons which is unable to elucidate, chose to provide for a hiatus in enforcement, whereby those conducting operations under interim

permits after approval of a state permanent program could not be cited for a violation of performance standards by OSMRE unless an imminent danger resulted. This would be true regardless of whether or not a state had the authority to enforce the interim standards since the existence of Federal enforcement authority under 30 CFR 843.13(b) is independent of the question of a state regulatory authority having shown good cause for failure to act. Such an interpretation of the regulations is totally at odds with the entire program which was promulgated at 30 CFR 843.12 for the expressed purpose, as noted in the regulatory preamble, of filling "a void or gap in the Federal enforcement scheme - a gap between the existence of uncorrected violation and the prerequisite showing for section 521(b) proceedings to take over enforcement of a State program." 44 FR 15302 (Mar. 13, 1979).

Consistent with the view that the Secretary was promulgating 30 CFR 843.12(b) to fill regulatory gaps, we believe that the language used therein, *i.e.*, approved state program, must be interpreted as including within its ambit so much of the initial Federal performance standards as continued to apply to mining operations within the State.

We fully recognize that this Board has consistently held that regulations must be sufficiently clear so as to put on notice those who are required to comply therewith. *See e.g., Brian D. Haas*, 66 IBLA 353 (1982); *Georgette B. Lee*, 3 IBLA 272 (1971). In point of fact, however, the regulation which appellant is charged with violating, 30 CFR 715.19, is perfectly clear. What is more, this regulation clearly applied. *See* 30 CFR 710.11(a)(3)(iii). The only arguably ambiguous regulation deals with question whether OSMRE had authority to cite a violation of 30 CFR 715.19. Appellant cannot be heard to argue that OSMRE should be estopped from enforcing 30 CFR 715.19 because appellant had relied upon an ambiguity in 30 CFR 843.12(b) to insulate itself from the consequences of its substantive violations. *See United States v. Bohme*, 48 IBLA 267, 324-25, 87 I.D. 248, 277-78 extended interim permit were properly subject to the procedures set forth at 30 CFR 843.12(b) and that the failure of the State regulatory authority to take appropriate action because it lacked authority under Indiana law to enforce the Federal interim program did not constitute "good cause" as that phrase is used in 30 U.S.C. § 1271(a)(1) (1982).

[3] Finally, we address Peabody's contention that the Embury Church was not a "dwelling, public building, school, church, or community or institutional building outside the permit area "within the meaning of 30 CFR 715.19(e)(2)(ii)(B)(I), or even a "structure" within the contemplation of 30 CFR 715.19(e)(I)(vi). Peabody contends that the word "church" means a building used for religious services by its owner or with the owner's consent. Otherwise, contends Peabody, 30 CFR 715.19(e)(2)(ii)(B)(I) would protect trespassers in their unlawful use of another's property.

This argument has no merit. The restrictions on blasting activity were intended to prevent injury as well as to prevent damage to public and private property. H.R. Rep. No. 218, 95th Cong., 1st Sess. 174, reprinted in 1977 U.S. Code Cong. & Admin. News 705. Appellant argues that "[a]lthough

religious services were being conducted in the building, they were being conducted by trespassers without legal authority." Therefore, appellant concludes, Embury Church "was not a church at all but an abandoned building" not protected by 30 CFR 715.19(e)(2)(ii)(B)(i). Appellant's conclusion, however, does not flow from its premise.

It is a stipulated fact that the South Indiana Conference of United Methodist Churches had declared the church abandoned and was not conducting services at the time the blasting occurred (Stip. 10). It is also stipulated however, "[t]hat [Peabody] had knowledge of the fact that religious services of some kind were being conducted at the Embury Church" during the period of its blasting (Stip. 14). It is apparently Peabody's theory that the status of the worshippers as trespassers deprived them of any protection afforded by 30 CFR 715.19(e)(2)(ii)(B)(i) and allowed Peabody to conduct blasting operations without any regard to physical well-being of these individuals. We find it difficult to credit such an argument.

We recognize that situations may arise when individuals are using abandoned buildings for church purposes without the knowledge of coal mining operators. But this would merely give rise to a question of fact as to whether the operator had a reasonable basis for his ignorance. In this case, Peabody freely admits that it knew that religious services were being conducted at Embury Church. It will not now be permitted to contend that the building was not a church. Inasmuch as we have determined that the Embury Church was used as a "church" within the purview of 30 CFR 715.19(e)(2)(ii)(B)(i), appellant's argument that the word "structure" used in 30 CFR 715.19(e)(1)(vi) should be limited to "dwelling, public building, school, church, [etc.]" need not be examined. We conclude, for the reasons set forth above, that Judge Miller correctly upheld the validity of NOV's Nos. 84-06-12-01 and 84-06-12-02 and properly assessed the civil penalty in the stipulated amount of \$3,325.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Miller is affirmed for the reasons stated herein.

James L. Burski
Administrative Judge

We concur:

Kathryn A. Lynn R. W. Mullen
Administrative Judge
Alternate Member

Administrative Judge

